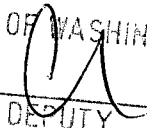


FILED
COURT OF APPEALS
DIVISION II

2015 NOV 30 AM 11:21

STATE OF WASHINGTON

BY  DEPUTY

47278-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Estate of CAROL COLLISTER,

Deceased.

ROCKY A. FELLER, Individually and as Personal Representative of the
Estate of Carol Collister,

Appellant,

v.

DONNA COLLISTER and BARBARA GUPTA,

Respondents.

REPLY OF APPELLANT

Jonete W. Rehmke, WSBA #28970
Connor J. Costello, #44894
REHMKE & FLYNN, PLLC
917 Pacific Ave., Ste. 407
Tacoma, WA 98402-4421
(206) 330-0608
jonete@rehmkeandflynn.com
connor@rehmkeandflynn.com

Attorneys for Appellant

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	1
II.	ASSIGNMENTS OF ERROR	1
III.	ARGUMENT	1
	A. A Testator’s Will Cannot Alter the Recipient of Her Life Insurance Proceeds Where the Testator has Designated a Payable-On-Death Beneficiary in Her Life Insurance Policy.....	1
	B. Respondents Are Not Creditors of Ms. Collister’s Estate; Therefore, the Cases Respondent Relies on are Inapplicable to the Issue on Appeal.....	3
VI.	CONCLUSION.....	5

TABLE OF AUTHORITIES

CASES

<i>In re Estate of Freeberg</i> , 130 Wn. App. 202, 122 P.3d 741 (2005)	3
<i>In re Estate of Milton</i> , 48 Wn.2d 389, 294 P.2d 412 (1956)	4, 5
<i>Woodard v. Gramlow</i> , 123 Wn. App 522, 95 P.3d 1244 (2004).....	4, 5

STATUTES

RCW 11.02.005(10).....	2, 3
------------------------	------

RCW 11.11.....	1, 2, 3
RCW 11.11.010(7)(a)	2
RCW 11.11.020(1).....	2

STATEMENT OF THE CASE

The parties in this matter all agree as to the material facts of this case. The only issue before the Court is an issue of law: whether the trial court incorrectly interpreted RCW 11.11, Washington's Testamentary Disposition of Nonprobate Assets Act, and erred in ruling that the \$25,000.00 in life insurance proceeds were the corpus of a testamentary trust belonging to Respondents.

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it incorrectly interpreted RCW 11.11 and ordered Rocky Feller to disburse the \$25,000 in life insurance proceeds to Respondents, despite the fact that Mr. Feller was named in the life insurance policy as the pay-on-death beneficiary.

II. ARGUMENT IN REPLY

A. **A Testator's Will Cannot Change the Recipient of Her Life Insurance Proceeds from the Designated Payable-On-Death Beneficiary Named in Her Life Insurance Policy.**

An insurance policy is a contract between two parties and the interpretation thereof is a matter of law.¹ Where the policy's language is clear, its terms must be enforced as written.²

¹ *Valley Furniture & Interiors, Inc. v. Transportation Ins. Co.*, 107 Wn.App. 104, 106, 26 P. 3d 952 (2001).

² *Id.*

Washington's Testamentary Disposition of Nonprobate Assets Act, RCW 11.11, "allows individual's to dispose of certain types of nonprobate assets through their wills."³ RCW 11.11.020(1) provides that upon an owner's death, her interest in a non-probate asset specifically identified in her will belongs to the testamentary beneficiary named to receive its bequest. This rule, however, has its exceptions.

Our legislature specifically exempted a payable-on-death provision in a life insurance policy from the types of non-probate assets that may be altered by testamentary disposition under RCW 11.11. RCW 11.11.010(7)(a) adopts by reference the definition of "nonprobate asset" set forth in RCW 11.02.005(10), which states the following: "'Nonprobate asset' means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will... **'Nonprobate asset' does not include: A payable-on-death provision of a life insurance policy...**" (Emphasis added).

³ *In re Estate of Burks*, 124 Wn. App. 327, 329 (2004).

In this case, Carol Collister's will cannot operate to alter the beneficiary designation in her life insurance policy because the nonprobate assets statute does not apply. The statute explicitly withholds a life insurance payable-on-death provision from the group of nonprobate assets that may be disposed of through one's will. In their brief, Respondents seemingly ignore RCW 11.11 and make no effort to reconcile their alleged right to the life insurance proceeds with the language of RCW 11.02.005(10).

In order for Ms. Collister to have changed the recipient of her life insurance proceeds to Respondents, she would have to have changed the beneficiary designation in the life insurance policy itself, or at least have made a substantial effort to complete the steps necessary to change the policy's pay-on-death designation to Respondents.⁴ Ms. Collister made no attempt whatsoever to change the pay-on-death beneficiary in her life insurance policy. Because Ms. Collister undertook no effort to change the pay-on-death beneficiary in her life insurance policy, and because Washington's nonprobate

⁴ See *In re Estate of Freeberg*, 130 Wn. App. 202, 205-206 (2005) ("The general rule in this jurisdiction and elsewhere as to attempted changes of beneficiaries on an insurance policy is that courts of equity will give effect to the intention of the insured when the insured has substantially complied with the provisions of the policy regarding that change. Substantial compliance requires that the insured has manifested an intent to change beneficiaries and done everything reasonably possible to make that change.")

assets statute does not allow a testator to change a life insurance payable-on-death beneficiary through her will, the terms of Ms. Collister's life insurance policy must be enforced as written. That contract clearly designates Mr. Feller as the payable-on-death beneficiary, naming him in his individual capacity and identifying him as a friend of Ms. Collister. Accordingly, Mr. Feller is legally entitled to the \$25,000.00 in life insurance proceeds.

B. Respondents Are Not Creditors of Ms. Collister's Estate; Therefore, the Cases Respondent Relies on are Inapplicable to the Issue on Appeal.

Respondents cite the cases of *Woodard v. Gramlow*⁵ and *In re Estate of Milton*⁶ for the proposition that insurance proceeds may constitute the corpus of a testamentary trust so long as such an intention is clearly expressed in the language of the decedent's will. The rule expressed in *Woodard* and *Milton*, however, concerned testamentary trusts for the payment of estate debts and final expenses, not testamentary trusts for beneficiaries.⁷ Respondents are not creditors of the Estate and have nothing to do with the Estate's debts or final expenses. *Woodard* and *Milton* are factually distinguishable and are inapplicable to the issue before the Court.

⁵ 123 Wn. App. 522, 95 P.3d 1244 (2004).

⁶ 48 Wn.2d 389, 294 P.2d 412 (1956).

⁷ See *Woodard*, 123 Wn. App. at 526-27; See also *Milton*, 48 Wn.2d at 393-94.

The *Woodard* and *Milton* courts ruled that where a testator's intent is clearly expressed in his or her will, assets such as life insurance proceeds that would otherwise be exempt from estate creditors could be used to pay the estate's debts and final expenses.⁸ This rule extends no further, and there is no legal precedent to support the proposition that a testator may change a pay-on-death life insurance beneficiary by language in her will. The life insurance policy controls, and because Mr. Feller remains the named beneficiary therein, he is the rightful owner of the life insurance proceeds at issue in this matter.

III. CONCLUSION

For the reasons set forth in Appellant's initial Brief, as well as the reasons set forth herein, Appellant respectfully requests that this Court vacate the February 6, 2015 judgment and order that the life insurance policy proceeds be awarded to Mr. Feller in his individual capacity. Appellant also respectfully requests that this Court award Mr. Feller his costs and attorney fees below and on appeal.

///

///

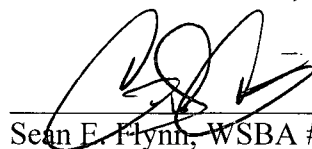
///

⁸ *Id.*

Dated this 24th day of November, 2015.

Respectfully Submitted,

REHMKE & FLYNN, PLLC

A handwritten signature in black ink, appearing to be 'SEAN FLYNN', written over a horizontal line.

Sean F. Flynn, WSBA #43386

Connor J. Costello, WSBA #44894

Attorneys for Appellant

1101 N Northlake Way #5

Seattle, WA 98103

(206) 330-0608

sean@rehmkeandflynn.com

connor@rehmkeandflynn.com

FILED
COURT OF APPEALS
DIVISION II

2015 NOV 30 AM 11:21

Certificate of Service

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the foregoing document was forwarded by email and send via first class postage, to the following:

Jeanne Bowie
McFERRAN LAW, P.S.
3906 South 74th Street
Tacoma, WA 98409
jbowie@mcferranlaw.com
Attorney for Respondents

Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402
coa2.filings@courts.wa.gov



Connor J. Costello